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No. 05-1607

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IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

—v.—

KATHY KROSKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The Clearing House Association L.L.C. has no corporate parents, and does not issue stock.

The Clearing House Association L.L.C. (the "Clearing House") respectfully submits this brief as *amicus curiae* in support of Petitioner U.S. Bank, N.A. ("U.S. Bank")'s petition for a writ of *certiorari* for review of the opinion of the United States Court of Appeals for the Ninth Circuit reported at 432 F.3d 976 (9th Cir. 2005).[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

The Clearing House is an association of leading commercial banks, including eight national banks organized under the National Bank Act, 12 U.S.C. § 21 *et seq.* (the "Act").[2] The Clearing House is dedicated to protecting the rights and interests of its members, as well as advancing the interests of the commercial banking industry. The Clearing House frequently presents the views of its members on important public policy issues affecting the commercial banking industry by, among other things, appearing as *amicus curiae* in cases raising significant questions of law relating to banking.

The Clearing House submits this *amicus curiae* brief in support of U.S. Bank's petition because the Court of Appeals' decision, if allowed to stand, would replace national banks' historic right to dismiss bank officers "at pleasure" with numerous, complex and conflicting regimes of state employment law and, more broadly, infringe upon the system of uniform bank regulation established by Congress and repeatedly confirmed by this Court.

In relevant part, Section 24 (Fifth) of the Act grants a national bank the "power" to, "by its board of directors, . . . appoint a president, vice president, cashier, and other officers, [and] . . . *dismiss such officers or any of them at pleasure*." 12 U.S.C. § 24

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[1] This brief is filed with the written consent of the parties. No counsel for a party authored any portion of this brief, nor did any person or entity other than the Clearing House make any monetary contribution to the preparation or submission of this brief.

[2] Petitioner U.S. Bank, N.A. is a member of the Clearing House, as are Bank of America, N.A., The Bank of New York, Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., LaSalle Bank, N.A., UBS AG, Wachovia Bank, N.A., and Wells Fargo Bank, N.A.

(Fifth) (emphasis added). Notwithstanding this clear language, the Court of Appeals held that Section 24 (Fifth) can be superseded by Respondent's age discrimination claim under the Washington Law Against Discrimination, WASH. REV. CODE §§ 49.60.010 *et seq.* ("WLAD").

The Court of Appeals' holding will create confusion and uncertainty, as well as multiply the litigation costs for the Clearing House's national bank members by subjecting them to multiple states' wrongful termination laws. Given the multi-state operations of many national banks, the risk that the Court of Appeals' decision will require national banks to comply with and litigate under multiple regimes of state employment law is substantial. Six of the national bank members of *amicus curiae* have branches in from nine to 30 states, and there are at least 164 national banks with branches in multiple states.[3]

Indeed, at least two Clearing House national bank members, Bank of America, N.A. and U.S. Bank, N.A., have branches in states within the jurisdiction of both the Sixth Circuit and the Ninth Circuit. Because of the split of authority now existing between those two Circuits, *compare* the decision of the Court of Appeals *with, e.g., Arrow* v. *Fed. Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004), absent review by this Court, the application of Section 24 (Fifth) will differ depending on whether the branch involved is in the Ninth Circuit or the Sixth Circuit. This Court, which long has recognized the need for uniform rules for national banks, *Beneficial Nat'l. Bank* v. *Anderson*, 539 U.S. 1, 10 (2003), should resolve this clear disagreement among the Courts of Appeals.

The Court of Appeals' decision also undermines national banks' ability to dismiss officers who are underperforming or dishonest, or simply to make the banks more efficient, and thereby threatens Section 24 (Fifth)'s long-recognized purpose of ensuring the effective and efficient operation and integrity of the national banking system.

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[3] *See* FDIC Institutional Directory, *http://www2.fdic.gov/idasp/main.asp* (last visited Jul. 5, 2006).

At an even more fundamental level, the Clearing House is deeply concerned by the preemption analysis employed by the Court of Appeals. The Clearing House's national bank members have a strong interest in ensuring that the courts give effect to Congress' intent to create a uniform system of national bank regulation in applying the Act, and the Clearing House believes the Court of Appeals failed to do so here.

The Court of Appeals premised its holding that Section 24 (Fifth) does not preempt the WLAD on its views that (1) the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 *et seq.* ("ADEA"), implicitly repealed national banks' power to dismiss officers "at pleasure" under Section 24 (Fifth) with respect to claims of termination based on age,[4] and (2) the prohibition of age discrimination in the WLAD "substantively mirrors" the ADEA. However, even assuming the ADEA did work a partial implied repeal of Section 24 (Fifth), to the extent there is a conflict between the two, it does not follow that Section 24 (Fifth) no longer preempts the WLAD simply because the WLAD resembles the ADEA. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), this Court squarely rejected the argument that Congress' implied partial repeal of a *federal* statute indicates an intent not to preempt *state* law.

The Court of Appeals further erred by presuming that Section 24 (Fifth) does not preempt the WLAD absent a clear expression of contrary Congressional intent. In fact, the very reverse is true. Section 24 (Fifth)'s plain language and Congress' purposes in adopting the Act required the Court of Appeals to presume that Section 24 (Fifth) *does* preempt the WLAD absent a clear Congressional statement to the contrary. Under this Court's jurisprudence, Section 24 (Fifth)'s grant of the broad power to dismiss officers at pleasure, the absence of a state-law savings clause in Section 24 (Fifth) and the presence of such clauses elsewhere in the Act, and Congress' long-recognized intent to protect national

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[4] Although the Court of Appeals described its perception of the federal law's status as "implicit repeal," this is incorrect. Even assuming the ADEA does supersede or create an exception to Section 24 (Fifth) of the Act in this limited area, that section remains in full force and effect except to the extent it contravenes another federal law (the ADEA).

banks from state interference compel the conclusion that Section 24 (Fifth) preempts the WLAD.

Finally, the Court of Appeals' cited authority in support of its presumption of non-preemption is inapposite. The Court of Appeals incorrectly relied on this Court's precedent applying ERISA's savings clause, even though Section 24 (Fifth) contains no such clause. Moreover, the Court of Appeals' reliance on the states' allegedly traditional occupation of the area of age discrimination law was misplaced. The proper question is not whether the states have historically regulated age discrimination, but whether they have traditionally regulated national banks' employment practices, and even the Court of Appeals recognized that the states have not done so.

STATEMENT OF THE CASE

Petitioner U.S. Bank's Board of Directors elected Respondent Kathy Kroske as an assistant vice president and an "officer" within the meaning of Section 24 (Fifth). Respondent served as a branch manager in one of Petitioner's offices. Following warnings about performance, Petitioner subsequently terminated Respondent's employment for underperformance. Respondent was fifty-one years old at the time of her termination.

Respondent sued Petitioner in Washington state court, claiming that Petitioner terminated her based on her age in violation of the WLAD. Petitioner removed the action to federal court and later moved for summary judgment on the ground that Respondent's WLAD claim was preempted by Section 24 (Fifth). The District Court granted Petitioner's motion, and Respondent appealed to the United States Court of Appeals for the Ninth Circuit.

The Court of Appeals reversed, holding that Section 24 (Fifth) does not preempt the WLAD. The Court of Appeals began by relying on a chronological approach to resolving the potentially conflicting federal statutes. The Court of Appeals reasoned that, because the ADEA was enacted later than the Act, the ADEA's prohibition of age discrimination and national banks' power to dismiss officers "at pleasure" must be reconciled in favor of the

later-enacted statute. *Kroske*, 432 F.3d at 987. The Court of Appeals then used this resolution of the conflict between two federal statutes to resolve the conflict between the first of the two federal statutes and state legislation. The Court of Appeals found that because the WLAD's prohibition of age discrimination "mirrors the substantive provisions of the ADEA," "[i]t follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act." *Id.*

Accordingly, in the Court of Appeals' view, Section 24 (Fifth) does not preempt the WLAD "in the absence of clear congressional intention to the contrary." *Id.* The Court of Appeals sought to buttress its conclusion by the assertion that the WLAD was enacted "pursuant to the State's historic police powers." *Id.* at 988.

SUMMARY OF ARGUMENT

First, even assuming the Court of Appeals were correct that the ADEA implicitly repealed Section 24 (Fifth), it does not follow that Section 24 (Fifth)'s preemption of the WLAD is invalidated because the WLAD resembles the ADEA. *Second*, the Court of Appeals erred in presuming that Section 24 (Fifth) does not preempt the WLAD absent a clear Congressional statement. Section 24 (Fifth)'s plain language, Congress' often-recognized goal of uniform national bank regulation, and Congress' traditional regulation of national banks' activities actually require a presumption of preemption in this case. *Third*, the Court of Appeals' decision runs counter to Congress' goals in enacting the Act, *i.e.*, protecting national banks from state interference, subjecting them to uniform rules, and preserving the integrity of, and public trust in, the national banking system.

The impact of this erroneous ruling on the uniform regulation of national banks itself fully justifies review by this Court. A separate and sufficient reason for review is that, as noted in U.S. Bank's petition, the Court of Appeals' ruling directly conflicts with other appellate decisions holding that Section 24 (Fifth), and analogous provisions in the Federal Reserve Act, 12 U.S.C. §§ 221 *et seq.*, and the Federal Home Loan Bank Act, 12 U.S.C.

§ 1432(a), preempted state-law employment discrimination claims. *See Katsiavelos* v. *Fed. Reserve Bank of Chicago*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, *7-8 (N.D. Ill. Mar. 3, 1995) ("at pleasure" dismissal language in Federal Reserve Act "is patterned on similar provisions of the National Bank Act") (citing H.R. 69, 63rd Cong. (1st Sess. 1913)).

ARGUMENT

I. EVEN IF THE ADEA IMPLICITLY REPEALED SECTION 24 (FIFTH), IT DOES NOT "FOLLOW" THAT SECTION 24 (FIFTH) RELINQUISHES ITS PREEMPTION OF THE WLAD.

A. This Court Has Specifically Rejected the Argument that the Implied Repeal of One Federal Statute by Another Also Precludes the Preemption of State Law.

The Court of Appeals held that because the ADEA repeals Section 24 (Fifth) by implication to the extent necessary to give effect to the ADEA, "[i]t follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act." *Kroske* v. *US Bank Corp.*, 432 F.3d 976, 987 (2005). However, even assuming that one federal law overrides an earlier federal law, it in no way "follows" that the earlier federal law (Section 24 (Fifth)) is thereby also deprived of its preemptive authority over state law (the WLAD). This Court rejected an identical theory in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) ("Southland").

In *Southland*, the Court reviewed a California Supreme Court decision holding that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, did not preempt a California statute prohibiting arbitration of claims under the California Franchise Investment Law. *Id.* at 5. The California Supreme Court reasoned that because the statute at issue was modeled on Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n—which, per this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), prohibited arbitration of claims under the Securities Act—the FAA could not preempt the California statute. *Keating* v. *Superior Court*, 31 Cal. 3d 584, 600-04, 645 P.2d 1192, 1200-04 (Cal. 1982).

This Court rejected the California Supreme Court's analysis and held that the FAA preempted the California statute, noting that "[t]he question in *Wilko* was not whether a state legislature could create an exception to § 2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception." *Southland*, 465 U.S. at 16 n.11.

Accordingly, in *Southland*, it did not follow from Congress' creation of an exception to the FAA through the Securities Act that the FAA no longer preempted *state law* modeled after the Securities Act. Similarly, here, even if Congress did implicitly repeal Section 24 (Fifth) via the ADEA, state law conflicting with Section 24 (Fifth), whether or not resembling federal law, remains preempted. *See also United States* v. *Locke*, 529 U.S. 89, 115 (2000) (rejecting state's argument that "its [oil tanker regulations are] not pre-empted because [they are] similar to federal requirements"); *Peatros* v. *Bank of Am.*, 22 Cal. 4th 147, 182, 187, 990 P.2d 539, 559, 562 (Cal. 2000) ("amendment or repeal of one federal statute by another should not be read as an invitation to append analogous state laws to the national scheme") (majority agreeing that Section 24 (Fifth) preempts California age discrimination statute).

As discussed further below, the key issue for preemption purposes is not whether the WLAD's language resembles the ADEA, but rather whether Congress has clearly expressed an intent that the National Bank Act not preempt state age discrimination law. Congress has expressed no such intent.

B. The Court of Appeals Failed to Follow the Principle that One Federal Statute Should Be Construed to Implicitly Repeal Another Only to the Minimum Extent Possible.

The Court of Appeals gave lip service to the principle that, even if two statutes are in conflict, implied repeal is to be found only to the minimum extent necessary, 432 F.2d at 987, citing *Kee Leasing Co.* v. *McGahan (In re Glacier Bay)*, 944 F.2d 577, 582 (9th Cir. 1991) (quoting *Silver* v. *N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)). In actuality, however, it ignored that rule in concluding that the implied repeal of Section 24 (Fifth) by the

ADEA meant that the Act's preemptive rule also was repealed as to state law.

"Repeal is to be regarded as implied only if necessary to make the [repealing statute] work, and even then only to the minimum extent necessary." *Silver*, 373 U.S. at 357. To make the ADEA "work," the Court of Appeals only needed to resolve any inconsistency between federal statutes and hold that national banks are subject to the ADEA's prohibition of age discrimination. It did not need to extend that holding to provide that Section 24 (Fifth) has been repealed and does not preempt state age discrimination law. Indeed, as U.S. Bank observes, the ADEA's statutory scheme not only can operate without state age discrimination law, but action by the EEOC pursuant to the ADEA supersedes any action by a state antidiscrimination agency. (Cert. Pet. at 25 (citing 29 U.S.C. § 633(a).)

Even when deciding whether Congress intended, by enacting a federal statute, to implicitly repeal a provision of the National Bank Act, this Court focused on Congress' intent to ensure the efficient operation of national banks. In *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 158 (1976), the Court held that Section 27 of the Securities Exchange Act ("Exchange Act"), 15 U.S.C. § 78aa, which allows a suit under the Exchange Act, *inter alia*, in any district where a violation occurred, did not impliedly repeal Section 94 of the Act, which provided that a national bank could only be sued in the district where it was established. The Court observed that Section 94 was intended "for the convenience of [national banking] institutions, and to prevent interruption in their business that might result from their books being sent to distant counties . . . ." *Id.* at 156 (quoting *Charlotte Nat'l. Bank* v. *Morgan*, 132 U.S. 141, 145 (1889)). Section 94's purposes, the Court held, could be harmonized with those of the Exchange Act by permitting suits against national banks under the Exchange Act but allowing those suits only where the banks were established. *Id.* at 155-57; *see also Gen'l. Elec. Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699, 707 n.9 (S.D.N.Y. 1966) (reaching same conclusion because national "banks are quasi-public institutions, . . . are subject to the control of Congress, and are not to be interfered with by state legislative or

judicial action . . . .") (quoting *Van Reed* v. *People's Nat'l. Bank of Lebanon*, 198 U.S. 554, 557 (1905)).

Similarly, the purposes of Section 24 (Fifth) and the ADEA can be effectively harmonized by permitting age discrimination suits by officers against national banks under federal law but prohibiting such suits under state law. If national banks are subject to the ADEA and not its state-law counterparts, they will be subject to a regime of antidiscrimination law but, consistent with the basic purpose of the Act, it will be a single uniform regime. Because, however, as described below, there are significant differences between the ADEA and many state age discrimination statutes (*see* Part III.B *infra*), requiring national banks to comply with multiple state age discrimination laws will be costly and disruptive to their operations (*see* Part III.A *infra*).

II. THE COURT OF APPEALS ERRONEOUSLY PRESUMED THAT THE NATIONAL BANK ACT CANNOT PREEMPT THE WLAD ABSENT A CLEAR CONGRESSIONAL STATEMENT, WHEN IN FACT A PRESUMPTION OF PREEMPTION WAS REQUIRED.

The Court of Appeals "[began] with the presumption that Congress did not intend the National Bank Act to preempt the WLAD," 432 F.3d at 981, and held that Section 24 (Fifth) does not preempt the WLAD "in the absence of clear congressional intent to the contrary." *Id.* at 987. This approach and this conclusion are totally wrong. The Act's clear, unambiguous language and this Court's precedents required the Court of Appeals to presume that the Act *does* preempt state law absent a clear contrary statement by Congress.

The Court of Appeals recognized that national banking law ordinarily preempts contrary state law, 432 F.3d at 982, citing *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996), and that a presumption of preemption applies when a state regulates an area where there has been a significant federal presence, 432 F.3d at 981, citing *Locke*, 529 U.S. at 108. The court also recognized that there has been a significant federal presence in the regulation of national banks, which supports a presumption of preemption, but then reversed that presumption because the states had "historic police powers to prevent dis-

crimination on specified grounds." 432 F.3d at 981. That turns the analysis on its head. A finding of preemption depends on the existence of Congressional intent and a significant federal presence which, if they exist, are not overridden by the origins of the preempted state statute. In *Barnett Bank* itself, this Court rejected the very argument that traditional state regulation of insurance sales insulated from preemption a Florida regulation prohibiting sales of insurance by national banks. 517 U.S. at 43.

A. The Act's Plain Language Mandates a Presumption that It Preempts Conflicting State Law Absent a Contrary Congressional Statement.

Section 24 states, in relevant part, that a national bank "shall have *power* to . . . dismiss . . . officers or any of them at *pleasure* . . . ." 12 U.S.C. § 24 (Fifth) (emphasis added). There is no limitation on this power; indeed, the phase "at pleasure" demonstrates the unfettered breadth of authority conferred. The statute's grant of the "power" of dismissal at pleasure establishes a presumption that national banks may exercise that power unrestricted by state law. *See Barnett Bank*, 517 U.S. at 32 (Court "interpret[s] grants of . . . both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law").

Section 24 of the Act contains no language subjecting to state law national banks' power to dismiss employees at pleasure. *See* 12 U.S.C. § 24. However, Congress did insert state-law savings clauses elsewhere in the Act. *See* 12 U.S.C. § 36(c) ("A national banking association may . . . establish and operate new branches . . . if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question . . . ."); 12 U.S.C. § 85 ("Any association may . . . charge . . . interest at the rate allowed by the laws of the State . . . ."); 12 U.S.C. § 90 ("Any national banking association may . . . give security for the safekeeping and prompt payment of the funds so deposited to the same extent . . . as is authorized by the law of the State in which such association is located . . . ."); 12 U.S.C. § 92a(a) ("Comptroller of the Currency . . . may grant . . . national banks applying therefor, when not in contravention

of State or local law, the right to act as trustee . . . ."); *see also Barnett Bank*, 517 U.S. at 34.

Congress' decision not to include a state-law savings clause in Section 24 (Fifth), while it did so elsewhere, confirms that Congress did not intend to allow state law to affect national banks' statutory power to dismiss officers at pleasure. *See Franklin Nat'l. Bank* v. *New York*, 347 U.S. 373, 378 (1954) ("We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances."); *see also Fid. Fed. Sav. & Loan Ass'n.* v. *De La Cuesta*, 458 U.S. 141, 163 (1982) (Federal Home Loan Bank Act preempted state law in the absence of savings clause because "if federal savings and loans were expected to conform to state law except where explicitly pre-empted in the Act itself, the provisions incorporating specific aspects of state law were needlessly repetitive").

Because Section 24 has no language subjecting national banks' power to dismiss employees at pleasure to state restriction, Section 24 preempts Respondent's claims under the WLAD. *See Barnett Bank*, 517 U.S. at 34-35 (because the Act "explicitly grants a national bank an authorization, permission or power" to sell insurance under 12 U.S.C. § 92, and it "contains no 'indication' that Congress intended to subject that power to local restriction," the Act preempted contrary state law).

B. Congress' Objective of Uniform National Bank Regulation Requires a Presumption of Preemption.

This Court has repeatedly noted that Congress' objective of uniform national bank regulation and the comprehensiveness of the Act's scheme regarding national banks' operations weigh strongly in favor of the Act's preemption of conflicting state statutes. *See Beneficial Nat'l. Bank*, 539 U.S. at 10-11 (need for "[u]niform rules limiting the liability of national banks. . . . supports the established interpretation of §§ 85 and 86 [of the Act] that gives those provisions the requisite pre-emptive force to provide removal jurisdiction"); *Marquette Nat'l. Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15, 318 (1978) (because "the National Bank Act. . . [was] intended to facilitate . . . a 'national banking system.' . . . . [w]e would certainly be

exceedingly reluctant to read . . . a hiatus into the [Act] in the absence of evidence of specific congressional intent"); *Farmers' & Mechanics' Nat'l. Bank* v. *Dearing*, 91 U.S. 29, 33-34 (1875) ("National banks . . . are instruments designed to be used to aid the government in the administration of an important branch of the public service. . . . [and thus] the States can exercise no control over them . . . except in so far as Congress may see proper to permit.").

The Court of Appeals should have presumed that Section 24 (Fifth) preempts the WLAD based on this Court's repeated affirmations of Section 24's preemptive force.

C. The Court of Appeals' Authority for its Presumption of Non-Preemption Is Inapposite.

1. *Shaw* v. *Delta Airlines* is inapposite because it relied on ERISA's anti-preemption savings clause and Section 24 (Fifth) has no such language.

The Court of Appeals relied on *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983), for its assumption that the Act cannot preempt the WLAD absent a clear legislative statement, but *Shaw* is inapposite. In *Shaw*, the Court held that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, did not completely preempt a state antidiscrimination statute, but it did so on the basis of a specific anti-preemption provision. Section 514(d) provides that ERISA "shall not 'be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.' " *Shaw*, 463 U.S. at 101 (citing 29 U.S.C. § 1144(d)). The Court found this language sufficient to protect, in part, state law against preemption because "[s]tate laws" such as the state antidiscrimination law at issue "play a significant role in the enforcement of Title VII," and thus complete preemption would effectively "modify" or "impair" Title VII. *Id.* at 102.

Contrary, then, to the Court of Appeals' finding, *Shaw* has no application to this case because Section 24 (Fifth) contains no anti-preemption clause. Indeed the absence of such a clause confirms Congress' preemptive intent. In holding that Section 92 of the National Bank Act preempted state law, *Barnett Bank* specif-

ically distinguished cases concerning statutes "that accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law." *Barnett Bank*, 517 U.S. at 34.

2. National bank regulation is not an area "traditionally occupied by the states."

The Court of Appeals further relied on this Court's statement in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), that where "Congress legislate[s] . . . in a field which the States have traditionally occupied, ... we have worked on the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." The Court of Appeals acknowledged that this "assumption" does not apply if the relevant "field" for preemption purposes is the regulation of national banks, as "Congress has legislated in the field of banking from the days of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 . . . (1819), creating an extensive federal statutory and regulatory scheme." *Kroske*, 432 F.2d at 982 (quoting *Bank of Am.* v. *City & County of S.F.*, 309 F.3d 551, 559 (9th Cir. 2002)). Without any supporting authority, however, the Court of Appeals assumed that the relevant field was not regulation of national banks, but of age discrimination.

The Court of Appeals' assumption is erroneous; the question here relates to the authority of national banks in an essential aspect of their operations. Indeed, when deciding whether the Act preempts a state law, this Court has framed the inquiry as whether the state may regulate national banks' operations—not whether the state may generally regulate the type of conduct the statute concerns. *See Beneficial Nat'l. Bank*, 539 U.S. at 11 (issue in deciding whether Act preempted general state usury statute was whether there can be a "state-law claim of usury against a national bank"); *First Nat'l. Bank of San Jose* v. *Cal.*, 262 U.S. 366, 369 (1923) (issue in deciding whether Act preempted statute generally providing for escheat of bank deposits was whether state "may . . . dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due").

III. THE COURT OF APPEALS' DECISION FRUSTRATES CONGRESS' GOALS OF UNIFORM REGULATION AND ASSURING THE INTEGRITY OF THE NATIONAL BANKING SYSTEM.

A. The Court of Appeals' Decision Conflicts with this Court's Precedents Recognizing the Importance of Uniform National Bank Regulation.

Because it held that Section 24 (Fifth) does not preempt state age discrimination law, the Court of Appeals' decision threatens to subject national banks to multiple and potentially inconsistent regimes of state employment regulation.[5] The uncertainty and litigation costs that will result from the Court of Appeals' decision will impair national banks' ability efficiently to perform their duties.

This Court long has recognized that a key purpose behind the National Bank Act was to assure that national banks are subjected to a uniform system of regulation. *See Beneficial Nat'l. Bank*, 539 U.S. at 10 (National Bank Act preempted state usury law because "[u]niform rules limiting the liability of national banks . . . are an integral part of a banking system that needed protection from 'possible unfriendly State legislation' "); *First Nat'l. Bank*, 262 U.S. at 370 (conflicting state regulations regarding escheat of funds in accounts at national banks "seem incompatible with [Congress'] purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile . . . ."); *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903) (Act creates "a system . . . independent, so far as powers conferred are concerned, of state legislation which . . . might impose limitations and restrictions as various and as numerous as the States"). This

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[5] As the District Court noted below,

> "Even assuming that Title VII and ADEA are not preempted by the National Bank Act, those federal remedies cannot open the window to state legislation. To append consistent state regulation to Title VII and ADEA would repeal the National Bank Act's uniform scheme of federal legislation and subject national banking associations to the vagaries of over 50 unique employment approaches." (Cert. Pet. at 60a.)

Court should grant *certiorari* to ensure that Congress' intent in this regard is fulfilled.

B. The Court of Appeals' "Substantively Mirrors" Approach Does Not Diminish the Threat to Uniform National Bank Regulation Created by its Holding.

The Court of Appeals attempted to justify its non-preemption holding on the basis that, because Respondent's "age discrimination claim under the WLAD . . . substantively mirrors a claim under the ADEA," holding that Section 24 (Fifth) does not preempt Respondent's WLAD claim would not disrupt Congress' scheme of uniform national banking regulation. *Kroske*, 432 F.3d at 989. The Court of Appeals' "substantively mirrors" standard, however, is inherently vague and likely to generate the very litigation costs and uncertainty, and threat to national banks, that Congress intended to prevent through the Act. Not only would the "substantively mirrors" standard create confusion and uncertainty, it is illogical. If a state statute does not meet the standard (however defined), there is an obvious need for preemption. If it does meet the test, there is no need to override the general principle of preemption.

Although both the ADEA and the WLAD cover the same general subject, there are material differences between them. For example, unlike the ADEA, the WLAD allows emotional distress damages and does not require administrative exhaustion prior to suit. (Cert. Pet. at 19-20.) In *Fasano* v. *Fed. Reserve Bank of N.Y.*, No. 05-4661, ___ F.3d ___ (3d Cir. Aug. 3, 2006) (slip op. at 29), the Court held that 12 U.S.C. § 341 (Fifth) preempts state employment law that, unlike the ADEA, permits individual damage liability and does not require exhaustion of administrative remedies. Moreover, courts interpreting the WLAD are not bound by federal precedent. *See Hill* v. *BCTI Income Fund-I*, 144 Wn.2d 172, 180, 22 P.3d 440, 446 (Wash. 2001) "[W]hile federal employment law rulings represent 'a source of guidance, . . . we are free to adopt those theories and rationales which best further the purposes and mandates of our state statute' "). A plaintiff may sue a supervisor individually under

the WLAD, but not under the ADEA. *See, e.g., Brown* v. *Scott Paper Worldwide Co.*, 143 Wn.2d 349, 358, 20 P.3d 921, 926 (Wash. 2001) (under WLAD, "a supervisor acting in the interest of an employer who employs eight or more people can be held individually liable for his or her discriminatory acts").

We do not know whether the Court of Appeals was unaware of these significant differences between the ADEA and WLAD or assumed, *sub silentio*, that they were not inconsistent with the "substantively mirrors" test. In either event, the differences demonstrate that the decision below must be reversed. If a state statute can be deemed to substantively mirror a federal statute despite greater potential penalties and the absence of key administrative safeguards, then the test is not really one of parallelism. Rather it is reduced to inconsistent legislation—a classic preemption situation.[6]

These and other differences between the ADEA and its state-law counterparts demonstrate that the Court of Appeals' "substantively mirrors" standard allows for a distorted reflection that will impair the uniformity of the federal national bank regulatory scheme.

C. The Court of Appeals' Decision Undermines the Integrity of the National Banking System.

Courts and commentators have long recognized that, given the importance of a national bank officer's role as a representative of the bank with access to a customer's funds and property, ensuring that national banks possess the power to dismiss officers at pleasure is important to maintaining the integrity of and public trust in the bank. *See, e.g., Westervelt* v. *Mohrenstecher*,

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[6] These differences from the ADEA are not limited to the WLAD, but also exist with respect to other state employment discrimination statutes. For instance, the ADEA and its state counterparts contain different statutes of limitations. Although an ADEA plaintiff generally has 180 days from an unlawful employment practice to file charges with the EEOC, 29 U.S.C. § 626(d), a plaintiff under the California Fair Employment and Housing Act has one year from the unlawful conduct to file charges with the Fair Employment and Housing Commission. CAL. GOV. CODE § 12960(d). *See also* OR. REV. STAT. § 659A.820 ("[A] complaint . . . must be filed no later than one year after the alleged unlawful practice" to bring state agency charge).

76 F. 118, 122 (8th Cir. 1896) ("[I]t is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them."); *Aalgaard* v. *Merchants Nat'l. Bank, Inc.*, 224 Cal. App. 3d 674, 692, 274 Cal. Rptr. 81, 92 (Cal. Ct. App. 1990) (purpose of " 'at pleasure' provision of section 24 (Fifth) was to confer . . . sweeping powers of dismissal in order to ensure the fiscal integrity of national banks and to instill public confidence in those financial institutions.").

Subjecting national banks to multiple regimes of state employment regulation, as the Court of Appeals' decision does, will create uncertainty as to whether negligent or even dishonest officers may be lawfully terminated, and will discourage the dismissal of officers for legitimate cost reasons. Accordingly, the Court of Appeals' decision contravenes Congress' goal of preserving public trust in the national banking system.

IV. THE COURT OF APPEALS' DECISION CREATES A SPLIT BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUITS REGARDING SECTION 24 (FIFTH)'S PREEMPTIVE EFFECT.

The Court of Appeals' decision is at odds with other Circuits' precedents interpreting provisions identical to Section 24 (Fifth) in other federal banking statutes. *See Arrow* v. *Fed. Reserve Bank of Chicago*, 358 F.3d 392, 393 (6th Cir. 2004) ("at pleasure" provision of Federal Reserve Act preempted state law claims); *Ana Leon T.* v. *Fed. Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987) (same); *see also Andrews* v. *Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) ("at pleasure" provision of Home Loan Bank Act preempted state wrongful termination law); Cert. Pet. at 12-15. The Court of Appeals noted that courts have interpreted these statutes and the Act consistently with each other; their language is "virtually identical." 432 F.3d at 983, n.2. *See Fasano*, slip op. at 18 n.8.

Moreover, the Second Circuit has strongly suggested that it shares the Fourth and Sixth Circuits' view. *See Wachovia Bank,*

N.A. v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (*petition for cert. filed*) (Section 24 preempted state regulation of national banks' operating subsidiaries because "[t]he presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time," and "[r]egulation of federally chartered banks is one such area") (citation omitted).

The Third Circuit most recently noted that Section 341 (Fifth) of the Federal Reserve Act was analogous to Section 24 (Fifth) of the Act, *Fasano*, slip op. at 18 n.8, and held preempted state employment laws that granted greater substantive, procedural or remedial protections than permitted by federal law. *Id.* at 17, 32. The Court noted that it need not take a position on whether state remedies exactly consonant with the ADEA would be preempted. *Id.* at 28. That case, however, was certified by the District Court, and the Third Circuit granted permission to appeal, because of "a wide split in authority among courts around the country" in dealing with preemption of state employment law claims. *Id.* at 8-9. National banks are confronted with employment claims frequently, and should not be subject to non-uniform laws and rules depending on which Court of Appeals has jurisdiction over a particular branch. This Court should resolve this split in authority.

CONCLUSION

For the reasons stated herein and in U.S. Bank's Petition for a Writ of Certiorari, this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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